



H.R. 3685 – Employment Non-Discrimination Act of 2007

EXECUTIVE SUMMARY

Representative Barney Frank (D-MA) introduced the Employment Non-Discrimination Act of 2007 (H.R. 3685) on September 27, 2007. The bill was approved by the House Education and Labor Committee on October 18, 2007, by a vote of 27 to 21. It is expected to be considered on the floor on November 7, 2007.

H.R. 3685 prohibits employment discrimination based on an individual's actual or perceived sexual orientation (including discrimination based on those with whom an individual associates), and would apply to employers (as defined by H.R. 3685) with 15 or more employees. Sexual orientation is defined as "homosexuality, heterosexuality, or bisexuality."

Republicans on the Education and Labor Committee raised concerns that the bill does not provide adequate exemptions for religious organizations, which would result in limitations on the hiring prerogatives of non-denominational religious schools. Additionally, Committee Republicans argue that it fails to define the term "perceived" sexual orientation, which would lead to uncertainty and increased litigation.

The Administration has issued a veto threat for the bill in its current form.

The Congressional Budget Office estimates that H.R. 3685 "would cost \$28 million over the 2008-2012 period for the Equal Employment Opportunity Commission (EEOC) to handle additional discrimination cases."

FLOOR SITUATION

H.R. 3685 is being considered on the floor under a structured rule. The rule:

- Provides one hour of debate equally divided and controlled by the Chairman and Ranking Republican Member of the Education and Labor Committee.
- Waives all points of order against consideration of the bill and the amendments except those arising under clause 9 (earmarks) and 10 (PAYGO) of Rule XXI.
- Provides that the bill shall be considered as read.
- Waives all points of order against provisions of the bill. This waiver does not affect the point of order under clause 9 (earmarks) of Rule XXI.

- No amendments shall be in order except those amendments printed in the Rules Committee report.
- Provides that the amendments made in order in the report may be offered only in the order printed in the report, may be offered only by a Member designated in the report, shall be considered as read, shall be debatable for the time specified in the report equally divided and controlled by the proponent and opponent, shall not be subject to amendment, and shall not be subject to a demand for division of the question in the House or in the Committee of the Whole.
- Waives all points of order against amendments except for clauses 9 (earmarks) and 10 of Rule XXI.
- Provides one motion to recommit with or without instructions.
- Provides that, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker.

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SUMMARY

H.R. 3685 prohibits employment discrimination based on an individual's actual or perceived sexual orientation (including discrimination based on those with whom an individual associates), and would apply to employers (as defined by H.R. 3685) with 15 or more employees. Sexual orientation is defined as "homosexuality, heterosexuality, or bisexuality."

Note: Republicans from the Education and Labor Committee raised concerns regarding the fact that the bill fails to define the term "perceived", that the Civil Rights Act does not include or define that term, and that the inclusion of a vague term would lead to uncertainty and increased litigation. "Even though employers would have difficulty in identifying non-inherent characteristics of a person, they would still be subjected to claims and potential liability." During Committee markup, Rep. Mark Souder (R-IN) offered an amendment to strike the word "perceived." This amendment failed by a vote of 18 to 30.

The bill provides exemptions for the armed forces and for religious organizations. The definition of religious organization, however, is limited to educational institutions that are at least substantially controlled, managed, owned, or supported by a particular religion or use a curriculum that is directed toward the propagation of a particular religion.

Note: Republicans from the Education and Labor Committee expressed concerns that this narrow definition "fails to cover non-denominational religious schools and invites the federal

government to investigate the religious nature of schools' curricula..." During Committee consideration of the bill, Rep. Pete Hoekstra (R-MI) offered an amendment to address this issue by broadening the definition of religious organization. This amendment failed by a vote of 21 to 27.

The bill prohibits employers from using marriage or the eligibility to marry as a term or condition of employment.

Note: Committee Republicans pointed out that this provision "could prevent some employers from hiring people they believe to be best-suited to the job," citing organizations designed to treat children and families for emotional distress as an example. Additionally, Committee Republicans stated that "the provision undermines the ability of states to define, preserve and protect the institution of marriage." Rep. Mark Souder (R-IN) offered an amendment to strike this provision during Committee markup. It failed by a vote of 18 to 30.

The bill grants the Equal Employment Opportunity Commission (EEOC) and other appropriate agencies the authority to administer and enforce the bill. It also waives State and federal immunity from a sexual discrimination suit, which is provided under the 11th Amendment. Punitive damages, however, are not available for federal or State governments that violate this law.

BACKGROUND

Title VII of the Civil Rights Act of 1964, which applies to employers with 15 or more employees (including federal, state, and local governments), prohibits employment discrimination based on race, color, religion, sex, or national origin. While the 1964 Civil Rights Act is the most significant anti-discrimination act, there are numerous other statutes that protect civil rights in the workplace. According to the Congressional Research Service, "a substantial minority of states have enacted their own prohibitions against sexual orientation employment discrimination."

In April 2007, Rep. Barney Frank (D-MA) introduced his first version of the Employment Non-Discrimination Act of 2007 (H.R. 2015), which also includes protection for "gender identity." Congressman Frank later introduced two bills (H.R. 3685 and H.R. 3686) to separate the gender identity protection (H.R. 3686) from the more narrowed definition of sexual orientation (H.R. 3685).

ADDITIONAL VIEWS

On October 23, the Administration issued a veto threat of the bill, arguing that it raises constitutional concerns, weakens the Defense of Marriage Act, "is inconsistent with the right to free exercise of religion," and "turns on imprecise and subjective terms that would make interpretation, compliance, and enforcement extremely difficult." ([Statement of Administration Policy: H.R. 3685](#), 10/23/2007)

Education and Labor Committee Republicans: the bill “raises many legitimate concerns that remain unresolved. For example, the bill’s religious exemption fails to adequately protect certain religious employers from liability. Also, the bill provides unprecedented protection against discrimination based on ‘perceived’ sexual orientation.” (Minority Views of the Education and Labor Committee Report, 10/22/2007)

COST

The Congressional Budget Office estimates that H.R. 3685 “would cost \$28 million over the 2008-2012 period for the Equal Employment Opportunity Commission (EEOC) to handle additional discrimination cases.” ([Congressional Budget Office Estimate](#), 10/22/2007)

AMENDMENTS

Reps. George Miller (D-CA) / Stupak (D-MI): (REVISED) The amendment 1) provides explicitly that any religious corporation, school, association or society that is exempt under either Section 702(a) or 703(e)(2) of Title VII’s religious exemptions is exempt under ENDA. It clarifies that the scope of Title VII’s exemption is exactly the scope of ENDA’s exemption (if a school is exempt from Title VII’s religious discrimination prohibitions, it will also be exempt from ENDA); and 2) it clarifies that ENDA does not alter the Defense of Marriage Act (DOMA) in any way. It strikes language referencing “a same-sex couple who are not married” in the Employee Benefits section of ENDA. It also inserts language clarifying that the term “married” has the meaning given such term in DOMA, directly incorporating DOMA’s definition of marriage.

Rep. Souder (R-IN): The amendment would strike paragraph (3) of section 8(a), which prohibits employers from conditioning employment on a person being married or being eligible to be married.

Rep. Baldwin (D-WI): The amendment would expand ENDA's protections to persons discriminated against based on gender identity, defined as the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth. The amendment includes language concerning shared facilities, dress, and grooming standards, as well as a paragraph stating that the construction of additional facilities are not required.

STAFF CONTACT

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